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**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Facilitating the Provision of Spectrum-Based	)	WT Docket No. 02-381
Services to Rural Areas and Promoting	)	
Opportunities for Rural Telephone Companies To	)	
Provide Spectrum-Based Services	)	
	)	
2000 Biennial Regulatory Review	)	WT Docket No. 01-14
Spectrum Aggregation Limits	)	
For Commercial Mobile Radio Services	)	
	)	
Increasing Flexibility to Promote Access to and the	)	WT Docket No. 03-202
Efficient and Intensive Use of Spectrum and the	)	
Widespread Deployment of Wireless Services, and	)	
to Facilitate Capital Formation	)	

To:     The Commission

**COMMENTS OF DOBSON COMMUNICATIONS CORPORATION**

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## TABLE OF CONTENTS

<b>SUMMARY .....</b>	<b>iii</b>
<b>INTRODUCTION .....</b>	<b>1</b>
<b>I.     Given The Commission’s Recognition That The Rural Wireless Market Is Competitive, This Proceeding Is Unnecessary. ....</b>	<b>3</b>
A.     Effective Competition Exists In Rural Areas. ....	4
B.     Dobson’s Experience Demonstrates That The Marketplace Provides Ample Incentives For Carriers To Serve Rural Areas. ....	5
C.     Only Subsidy Programs Will Facilitate Service To Uneconomic Areas. ....	7
D.     This Proceeding Is Premature Given the Secondary Markets Initiative. ....	9
<b>II.    The FCC Should Repeal the Cellular Cross-Interest Rule In Its Entirety. ....</b>	<b>10</b>
<b>III.   The FCC Should Take A More Active Role In Facilitating “Best Practices” By Local Governments In Tower Siting. ....</b>	<b>13</b>
<b>IV.    The FCC Should Not Adopt Measures That Would Introduce Uncertainties In The Marketplace .....</b>	<b>14</b>
<b>CONCLUSION .....</b>	<b>18</b>

## SUMMARY

Current marketplace forces are producing a generally competitive environment for spectrum-based services in rural areas. Indeed, the Commission found in its most recent annual CMRS competition report that “CMRS providers are competing effectively in rural areas” and that “effective CMRS competition does exist in rural areas.” As Dobson has repeatedly demonstrated, apparently to the Commission’s satisfaction, rural wireless consumers enjoy equivalent calling plans and options as their urban counterparts, and carriers who focus their services in these areas are subject to the pressures of the competitive nationwide marketplace for wireless service. In short, wireless services provided by rural carriers are largely indistinguishable from those provided by the nationwide carriers.

To the extent that the Commission perceives a problem with the deployment of wireless services in rural areas – *i.e.*, that they should be deployed to more sparsely populated areas or that more carriers should be competing in rural areas – the root cause of the problem is the basic economics of serving these areas. Where it makes economic sense for carriers to provide service, they enter. The Commission should not make the mistake of assuming that having fewer carriers serving rural areas than urban areas demonstrates a market failure in rural areas. To the contrary, this is evidence of a rationally functioning market. If the Commission wishes, through regulation, to provide an incentive for carriers to invest in wireless networks in areas where the high costs inherent in providing service make deployment uneconomic, it should ensure that wireless carriers are able to obtain cost subsidies provided through the universal service mechanisms.

Having focused its business strategy on non-urban markets since its inception, Dobson Communications Corporation applauds the Commission’s desire to look for additional ways to improve wireless services provided in rural areas. Most of the regulatory initiatives being considered in this proceeding are, however, premature at best. The Commission’s newly adopted rules on spectrum leasing, which were designed to facilitate access to spectrum and promote the use of underutilized spectrum, have not even taken effect yet. Until the Commission has had a chance to analyze the impact of spectrum leasing on its goals for rural wireless service, it should refrain from adopting new regulations. Dobson opposes several of the concepts raised in the *Notice of Proposed Rulemaking*, such as “keep what you use” licensing, government-defined easements in licensed spectrum, construction requirement modifications and spectrum audits. Dobson believes that adoption of these measures would unnecessarily inject uncertainty and impede economic growth in the wireless industry.

The Commission should, however, use the opportunity afforded by this proceeding to take two actions that would facilitate rural wireless service. First, the Commission should repeal the cellular cross-interest rule, 47 C.F.R. §22.942, in its entirety. This rule’s continued application in RSAs impedes investment in wireless carriers that serve rural areas and places carriers like Dobson at a disadvantage in negotiating transactions. The public interest will not suffer in the absence of this rule, because the Commission can continue to address any competitive concerns by applying its existing policies on a case-by-case basis. Second, the Commission can and should take a more active role in promoting greater consistency and transparency in facilities siting by encouraging local governments to adopt “best practice” procedures and standards.

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To: The Commission

**COMMENTS OF DOBSON COMMUNICATIONS CORPORATION**

Dobson Communications Corporation (“Dobson”) hereby submits its comments in response to the Commission’s October 6, 2003 *Notice of Proposed Rulemaking* in the above-captioned proceeding.<sup>1</sup> As a leading provider of rural and suburban commercial wireless services throughout the United States, Dobson is particularly well-positioned to offer comments in this proceeding.

**INTRODUCTION**

Dobson began as a rural telephone company in the 1930s with a single exchange in Western Oklahoma. Seeing the potential of mobile telephony to improve the lives of rural Americans, Dobson began offering cellular mobile services in 1990 in Western Oklahoma and the Texas Panhandle. Through an acquisition strategy targeting underdeveloped rural and suburban areas, Dobson has rapidly expanded

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<sup>1</sup> *Facilitating the Provision of Spectrum Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket No. 02-381, *Notice of Proposed Rulemaking*, FCC 03-222 (rel. October 6, 2003) (“*NPRM*”).

its wireless operations and currently owns or manages wireless networks in sixteen states, from Alaska to New York, and operates in 52 Rural Service Areas (“RSAs”) and 13 Metropolitan Statistical Areas (“MSAs”), with almost 1.6 million customers in a managed population base in excess of 11 million. Dobson’s wireless networks include rural areas, low-density ex-urban and suburban areas, and a handful of smaller cities, but approximately 85 percent of our coverage is in rural areas. We provide mobile phone service coverage to more than 98 percent of the population in our licensed areas.

Even with our rural orientation, Dobson was one of the first carriers to install digital technology in 100 percent of its markets, and we are continuing to introduce a variety of innovative products and services into virtually all of our markets. Our company is very different today than the local exchange carrier that started in Dust Bowl-era Oklahoma, but Dobson is still committed to providing high-quality services to customers in rural areas and believes strongly in the future of rural wireless services.

As a general matter, Dobson wishes to make clear that, whatever positions parties take regarding the questions posed in this proceeding, the Commission should not lose sight of one simple fact: current marketplace forces are producing a competitive environment for spectrum-based services in those rural areas where it makes economic sense for service providers to enter. The Commission recognized this fact less than six months ago when it stated that “effective CMRS competition does exist in rural areas.”<sup>2</sup> In the absence of a demonstrable market failure, the Commission should refrain from regulation that undermines incentives for service providers to invest and deploy in rural markets. To the extent that the Commission wishes to promote the deployment of wireless services in areas where the high costs inherent in providing service make such deployment uneconomic, the appropriate vehicle to achieve this goal is a universal service subsidy.

In light of the recent adoption of new spectrum leasing rules that are intended to increase access to spectrum and promote the use of underutilized spectrum, it would be premature for the Commission to adopt new regulations focused on rural wireless services before it has an opportunity to determine

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<sup>2</sup> *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 02-379, *Eighth Report*, FCC 03-150 at ¶ 13 (rel. July 14, 2003) (“*Competition Report*”).

whether and to what extent spectrum leasing will work to promote deployment of wireless services in rural areas. Furthermore, many of the proposals contained in the *NPRM*, if adopted, would interfere with economic growth in the wireless industry. In particular, Dobson opposes:

- the “keep what you use” approach to future spectrum licensing;
- the use of “government-defined easements” in licensed spectrum that would grant spectrum usage rights without the licensee’s prior consent;
- a vague “substantial service” requirement, unless it operates only as a “safe harbor” at renewal;
- any post-license renewal construction requirements on licensees; and
- audits to determine the amount of available spectrum.

Dobson continues to support the complete repeal of the cellular cross-interest rule, which would promote investment in wireless carriers serving rural areas. Finally, Dobson believes that the Commission could and should foster greater certainty and transparency in the facilities siting process by actively encouraging the use of “best practices” by local governments.

**I. Given The Commission’s Recognition That The Rural Wireless Market Is Competitive, This Proceeding Is Unnecessary.**

Effective competition exists in rural areas, as the Commission acknowledged in the recent *Competition Report* and as Dobson demonstrated in its comments in the *Rural NOI*.<sup>3</sup> CMRS services offered in rural areas are virtually indistinguishable from those offered in urban areas; there is no meaningful distinction between the two. The operation of marketplace forces – free from excessive regulation – has brought this about, yet the Commission is considering the adoption of regulations specifically targeted at improving rural wireless services. With respect, Dobson suggests that this is unnecessary.

Dobson appreciates the Commission’s apparent recognition that rural wireless service is competitive. In light of this, it is difficult to understand why the Commission would seek to intervene in

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<sup>3</sup> See *id.* at ¶¶ 13, 117; Dobson Comments, WT Docket No. 02-381, *Notice of Inquiry* (filed Feb. 3, 2003) (“Dobson Comments”); see also generally, *Facilitating the Provision of Spectrum Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket No. 02-381, *Notice of Inquiry*, 17 FCC Rcd 25554 (2002) (“*Rural NOI*”).

the absence of market failure.<sup>4</sup> Indeed, though it seeks to encourage the deployment of service, the instant proceeding may instead create uncertainty for carriers and the financial markets, which would have precisely the opposite effect. Access to capital is critical for providers to expand coverage, implement technological advancements, and improve service quality. The instant proceeding thus could have the unintended consequence of actually impeding service to rural areas.

#### **A. Effective Competition Exists In Rural Areas.**

The Commission released the latest CMRS competition report on July 14, 2003. After analyzing various measures of competition, including “the nature and number of market participants, the geographic extent of service deployment, technological improvements and upgrades, price competition, investment, usage patterns, churn, subscriber growth, and product innovations,” the Commission concluded that there is effective competition in the CMRS marketplace, both generally and in rural areas specifically.<sup>5</sup> The Commission stated:

[W]hile it appears that, on average, a smaller number of competitors are serving rural areas than urban areas, this difference does not necessarily indicate that effective CMRS competition does not exist in rural areas. On the contrary, . . . despite the differing structure of rural markets, effective CMRS competition does exist in rural areas.<sup>6</sup>

Focusing on rural rollout, available information shows that the average price of mobile service is very similar in urban and rural areas. Citing Dobson’s comments in the *Rural NOI*, the Commission noted that “nationwide and urban price trends have acted to constrain prices in rural areas, even where the

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<sup>4</sup> The Commission has previously acknowledged that regulatory intervention is generally inappropriate absent market failure. See *Jacqueline Orloff v. Vodafone AirTouch Licenses LLC*, 17 FCC Rcd 8987 (2002), *aff’d* *Jacqueline Orloff v. FCC*, D.C. Cir. No. 02-1189, \_\_\_ F.3d \_\_\_ (decided December 23, 2003) (“With respect to CMRS, the Commission generally has relied on market forces, rather than regulation, except when there is market failure.”); *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd 1411, 1478 (1994) (“[I]n a competitive market, market forces are generally sufficient to ensure the lawfulness of . . . terms and conditions of service set by carriers who lack market power”) (subsequent history omitted). Chairman Powell has echoed this view, stating that “reliance where possible on competitive market forces rather than regulation is a key part of the solution to our current troubles.” Michael Powell, FCC Chairman, “Rx for Telecom In Competition,” *Wireless Week*, January 15, 2003; see also, *Spectrum Policy Task Force Report*, ET Docket No. 02-135, *Report* at 41 (rel. Nov. 15, 2002) (“In general, command-and-control regulation should be reserved only for spectrum uses that provide clear, non-market public interest benefits or that require regulatory prescription to avoid market failure.”) (“*Spectrum Policy Task Force Report*”).

<sup>5</sup> *Competition Report* at ¶¶ 12-13.

<sup>6</sup> *Id.* at ¶ 13.

total number of operators may be lower.”<sup>7</sup> As nationwide wireless carriers extended their footprints into rural areas, both by building-out their own networks and through roaming and affiliation agreements, and began to advertise their services nationwide, rural residents became better informed about the available choices and began to demand these same choices in rural markets. Accordingly, the level of services and rates demanded by customers in rural markets are not, in any meaningful way, different from those demanded by urban customers even though the total number of operators may be lower. Because vigorous competition for wireless services exists in rural areas, both the quality of services and the quantity of coverage provided in these areas have increased, while prices have fallen.

The Commission found in the *Competition Report* that rural areas on average have slightly more than three licensed mobile competitors.<sup>8</sup> Though this figure is lower than that for urban areas, the Commission concluded, based on information regarding the number of competitors, pricing plans and other factors submitted at a public forum and in response to the *Rural NOI*, that “CMRS providers are competing effectively in rural areas.”<sup>9</sup> The Commission’s conclusion confirms Dobson’s view that the best measure of competition is not the number of competitors in a market, but whether carriers are under competitive pressure to offer innovative services and products at competitive prices.

**B. Dobson’s Experience Demonstrates That The Marketplace Provides Ample Incentives For Carriers To Serve Rural Areas.**

As noted above, Dobson is a leading provider of rural and suburban commercial mobile wireless services throughout the United States. Dobson’s recent experiences demonstrate that market forces are continuing to provide carriers with incentives to serve rural areas.

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<sup>7</sup> *Id.*

<sup>8</sup> The Commission based this finding on three different definitions of “rural” – non-nodal EA counties, RSAs and county population densities – all of which provided similar results. *Id.* at ¶¶ 111-15 (non-nodal EAs have an average of 3.2 licensed competitors, RSAs have an average of 3.3 licensed competitors, and counties with a population density of 100 persons per square mile or less have on average 3.3 licensed competitors).

<sup>9</sup> *Id.* at ¶ 117.



- On June 18, 2003, Dobson announced the completion of a transaction that made Dobson the largest wireless services operator in Alaska.<sup>10</sup> The transaction allows Dobson to combine the state's three largest population centers into one statewide, wireless footprint that covers 91 percent of Alaska's population. Dobson plans to expand its wireless coverage in Alaska and to introduce new voice and data services throughout the state. On November 20, 2003, Dobson announced that it has awarded approximately \$10 million in contracts to support the overlay of its Alaska market with 2.5-generation GSM/GPRS/Enhanced Data Rates for GSM Evolution ("EDGE") technology.<sup>11</sup> The overlay is scheduled to be completed by mid-2004 and the company plans to start selling GSM/GPRS wireless phones and other handsets in the second quarter of next year, starting with the Anchorage market. Dobson also plans to invest another \$3.5 million next year in Alaska to further enhance the capacity and efficiency of its statewide wireless network. With these expenditures, Dobson will have invested approximately \$24 million in Alaska in 2003 and 2004 to improve wireless service statewide.<sup>12</sup> The 2003 upgrades included installing a new telecommunications switch in Anchorage, expanding coverage in the Anchorage, Alaska MSA and the Alaska 2 – Bethel RSA ("AK-2") through the addition of 15 new cell sites, and increasing network capacity throughout its coverage areas in Anchorage, the Alaska 1 – Wade Hampton RSA, AK-2, and the Alaska 3 – Haines RSA.
- On August 19, 2003, Dobson announced the completion of its acquisition of American Cellular Corporation ("ACC") making Dobson the ninth largest wireless provider in the United States with almost 1.6 million subscribers and the largest independent rural wireless provider.<sup>13</sup> A month earlier Dobson also announced plans to accelerate the overlay of GSM/GPRS throughout their TDMA networks in the Dobson and ACC markets.<sup>14</sup> Dobson expects to substantially complete the overlay in its continental United States markets by the first quarter of 2004. The accelerated overlay will enable both Dobson and ACC to offer advanced and data services significantly sooner than previously planned to their customers and to the customers of their major roaming partners. Dobson and ACC also plan to install EDGE throughout their networks in the first half of 2004, which will significantly increase the speed of their wireless data services. Dobson's estimated capital expenditure budget plans in 2003 to implement these upgrades range between \$220-247 million.<sup>15</sup>

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<sup>10</sup> News Release, "Dobson Communications and AT&T Wireless Complete Exchange of Properties in California, Alaska; Dobson Now the Largest Wireless Services Operator in Alaska" (rel. June 18, 2003) (found at [www.dobson.net](http://www.dobson.net)).

<sup>11</sup> News Release, "Dobson Communications Upgrading Alaska Wireless Network – Company to Invest \$24 Million Statewide in 2003 and 2004" (rel. Nov. 20, 2003) (found at [www.dobson.net](http://www.dobson.net)).

<sup>12</sup> *Id.*

<sup>13</sup> News Release, "Dobson Communications Completes Acquisition of American Cellular Corporation; Creates Ninth Largest U.S. Wireless Provider" (rel. Aug. 19, 2003) (found at [www.dobson.net](http://www.dobson.net)). Dobson and AT&T Wireless Services, Inc. ("AT&T Wireless") jointly owned and controlled ACC previously, but as a result of the transaction, ACC is now a wholly-owned subsidiary of Dobson.

<sup>14</sup> News Release, "Dobson Communications and American Cellular to Accelerate GSM/GPRS Overlay of Networks, 2003-2004 Total Capital Expenditures Remain Unchanged" (rel. July 18, 2003) (found at [www.dobson.net](http://www.dobson.net)).

<sup>15</sup> *Id.*

- Dobson has also entered into GSM/GPRS roaming agreements with two additional nationwide carriers since the release of the *Rural NOI*. On July 14, 2003, Dobson announced an agreement with AT&T Wireless providing roaming capability for Dobson and ACC's customers on AT&T Wireless' next generation wireless networks throughout the United States.<sup>16</sup> The agreement also provides similar roaming access to AT&T Wireless' customers on Dobson's networks as they are upgraded. Dobson announced a similar arrangement on August 20, 2003 that will allow reciprocal GSM/GPRS roaming throughout the United States on the networks of T-Mobile, USA Inc. ("T-Mobile").<sup>17</sup> With these agreements in place in addition to the TDMA agreement that Dobson already has with AT&T Wireless and the TDMA/GSM agreement with Cingular Wireless LLC ("Cingular"), Dobson is able to offer its rural and suburban customers nationwide service and will also be able to provide advanced wireless services to customers throughout the United States and perhaps the world someday. In turn, Dobson's roaming partners are able to provide competitive service and expanded coverage in those rural areas covered by Dobson's network where they lack coverage.

Dobson recognizes the growth opportunities afforded in rural areas, and has developed its business strategy to focus on these areas.<sup>18</sup> Marketplace forces, and not regulation, are driving this growth, and Dobson and other rural carriers are extending coverage into new areas wherever it is economically feasible to do so.

### **C. Only Subsidy Programs Will Facilitate Service To Uneconomic Areas.**

To the extent that deployment of wireless services in rural areas is a problem deserving regulatory attention, its root cause is the cost of providing service there. Indeed, the Commission recognized in the *NPRM* "the inherent economic challenges of providing telecommunications services in sparsely populated, expansive rural areas . . . ."<sup>19</sup> The bottom line is that wireless carriers are in the business of providing service in areas where people can use it. Accordingly, providers naturally focus first on serving the more populated and the more heavily trafficked areas before expanding coverage to less-populated areas, provided that expansion is not cost prohibitive. It is unreasonable to expect that any carrier will

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<sup>16</sup> News Release, "AT&T Wireless Signs GSM/GPRS Roaming Agreements with Dobson Communications and American Cellular," (rel. July 14, 2003) (found at [www.dobson.net](http://www.dobson.net)).

<sup>17</sup> News Release, "Dobson Communications and T-Mobile, USA Inc. Sign Nationwide GSM/GPRS Roaming Agreement" (rel. Aug. 20, 2003) (found at [www.dobson.net](http://www.dobson.net)).

<sup>18</sup> See *Lehman Report*, "Dobson Communications, Leading Rural Wireless Pure Play" (Dec. 4, 2003).

<sup>19</sup> *NPRM* at ¶ 4.

extend service into an area in which costs make that service uneconomic. The only regulatory initiative that could overcome this basic market dynamic and create an incentive for carriers to serve uneconomic areas is a universal service subsidy. The Commission acknowledges the importance of direct subsidy programs to promoting the availability of rural service, and commits to address these issues in its High-Cost Universal Service proceeding.<sup>20</sup> Dobson looks forward to Commission action in that proceeding.

Dobson is concerned, however, with the Commission's recent trend of unnecessarily delaying approvals for Eligible Telecommunications Carrier ("ETC") status for wireless carriers.<sup>21</sup> Specifically, the Commission is delaying action on state petitions for FCC concurrence of re-defined service areas that deviate from the service areas of local exchange carriers ("LECs"). Re-definition, and thus FCC concurrence, is often necessary for wireless carriers to obtain ETC status because a wireless carrier's authorized service area does not typically coincide with the LEC's study area.<sup>22</sup> Previously, these petitions were routinely granted by the Commission, automatically, after expiration of a ninety-day period from the initial public notice because the Commission rarely sought a need for further investigation.<sup>23</sup> Recently, the automatic grant process has been suspended as the Commission apparently investigates re-herring issues raised by incumbent LECs ("ILECs") who seek to protect their monopoly status.<sup>24</sup>

Many of the issues raised by ILECs are irrelevant to the re-defined service area and/or have already been addressed by the state. Competitive ETC entry by wireless service providers will substantially benefit rural consumers. The Commission would do much to promote the availability of

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<sup>20</sup> See *NPRM* at ¶ 4 n.17.

<sup>21</sup> See Dobson's Written *Ex Parte* Presentation (filed Sept. 23, 2003), regarding the Petition by the Colorado Public Utilities Commission Pursuant to 47 C.F.R. § 54.207(c), for Commission Agreement in Redefining the Service Area of Wiggins Telephone Association, a Rural Telephone Company, CC Docket No. 96-45 (filed May 7, 2003).

<sup>22</sup> See 47 C.F.R. § 54.207(c); see also Dobson's Reply Comments, CC Docket No. 96-45 at 7 (filed June 3, 2003).

<sup>23</sup> 47 C.F.R. § 54.207(c)(3)(ii).

<sup>24</sup> See, e.g., *Public Notice*, "Wireline Competition Bureau Initiates Proceeding to Consider the Minnesota Public Utilities Commission Petition to Redefine Rural Tel. Co. Service Areas in the State of Minnesota, CC Docket No. 96-45, DA 03-3594 (WCB, rel. Nov. 7, 2003); *Public Notice*, "Wireline Competition Bureau Initiates Proceeding to Consider the Colorado Public Utilities Commission Petition to Redefine Service Area of Wiggins Tel. Ass'n in the State of Colorado, CC Docket No. 96-45, DA 03-2859 (WCB, rel. Sept. 9, 2003).

wireless service in rural areas by refusing to be distracted by the ILEC arguments, proceeding with automatic grants of concurrence, and acting swiftly to approve the pending petitions for re-definition.

**D. This Proceeding Is Premature Given the Secondary Markets Initiative.**

The Commission recently released an order establishing rules for spectrum leasing, an action that the Commission described as one which “enhances and complements several of the Commission’s major policy initiatives and public interest objectives, including our efforts to . . . enable development of additional and innovative services in rural areas.”<sup>25</sup> The Commission’s *Spectrum Leasing Order* is a significant step in the Commission’s overall spectrum policy goals, the intended beneficiaries of which include “small businesses trying to deliver services in rural communities.”<sup>26</sup>

As noted in the *NPRM*, the Commission’s Spectrum Policy Task Force recommended “that the Commission, in the first instance, focus on secondary markets as the primary means to increase access to spectrum” and only “after there has been sufficient time to consider the effectiveness of this approach,” that it consider alternative mechanisms.<sup>27</sup> Nevertheless, the Commission then asks whether “now is an appropriate time” to consider new initiatives.<sup>28</sup>

The Commission’s newly adopted rules on spectrum leasing, which facilitate access to spectrum and promote the use of underutilized spectrum, will not take effect until January 24, 2004.<sup>29</sup> Spectrum leasing may have a significant impact on rural wireless service by, among other things, (i) giving rural licensees the ability to monetize their spectrum rights and thus increasing their access to capital, and (ii) facilitating access to underutilized spectrum in rural areas for the provision of new and advanced services. Until the marketplace has had a chance to respond to the availability of spectrum leasing, and until the

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<sup>25</sup> *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 03-113 at ¶¶ 2, 43 (rel. Oct. 6, 2003) (“*Spectrum Leasing Order*”).

<sup>26</sup> *Id.* at ¶ 7. The Commission also determined that “a substantial amount of spectrum is underutilized in rural areas, and could be put to use through leasing arrangements.” *Id.* at ¶ 45.

<sup>27</sup> *NPRM* at ¶ 30 (citing *Spectrum Policy Task Force Report* at ¶ 58).

<sup>28</sup> *Id.*

<sup>29</sup> See 68 Fed. Reg. 66252 (rel. Nov. 25, 2003). In addition, in the *Further Notice* portion of the *Spectrum Leasing Order*, the Commission solicited comment on additional proposals in that proceeding.

Commission has analyzed the impact of spectrum leasing on its goals for rural wireless service, most of the regulatory initiatives being considered in the instant proceeding are, at best, premature. The Commission cannot possibly assess in any rational way whether additional measures, such as “government easements” or modified construction requirements, should be adopted until it has a chance to analyze the effects of spectrum leasing.

## **II. The FCC Should Repeal the Cellular Cross-Interest Rule In Its Entirety.**

Although Dobson questions the current need for any additional regulation of rural wireless services, this proceeding does afford the Commission an opportunity to remove a significant impediment to investment in rural wireless carriers. The Commission has consolidated into this proceeding petitions, filed by Dobson and others, seeking reconsideration of the Commission’s earlier decision to retain the cellular cross-interest rule, 47 C.F.R. § 22.942, in RSAs, as well as comments filed on this issue in the Commission’s 2002 biennial regulatory review.<sup>30</sup> Dobson fully supports elimination of the cross-interest rule where there are more than three CMRS competitors in a particular RSA and when non-controlling ownership interests are involved.<sup>31</sup> The Commission should, however, go even further and repeal the rule altogether in light of the meaningful economic competition that exists in the rural wireless marketplace.

The Commission eliminated the cellular cross-interest rule for MSAs because it concluded that the rule “is no longer necessary in urban markets, given the presence of numerous competitive choices for consumers in each market.”<sup>32</sup> As explained above, competition is flourishing in urban and rural areas alike. Given the successful development of competition in rural markets, the Commission cannot rationally continue to apply the rule, which is based on an artificial and meaningless distinction between MSAs and RSAs. Wireless consumers in RSAs are offered generally the same products and services as consumers residing in MSAs. Therefore, because the competitive pressures which RSA carriers face are the same as those faced by MSA carriers – even where there are fewer “facilities-based” carriers –

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<sup>30</sup> See *NPRM* at ¶ 93.

<sup>31</sup> *Id.* at ¶ 95.

<sup>32</sup> 2000 Biennial Regulatory Review *Spectrum Aggregation Limits for Commercial Mobile Radio Services*, WT Docket No. 01-14, *Report and Order*, 16 FCC Rcd 22668, 22707 (2001).

applying the cellular cross-interest rule in RSAs but not in MSAs is arbitrary and capricious and cannot be justified.

The Commission asks whether there is any harm in retaining the rule. Retaining the cellular cross-interest rule in RSAs has a significant adverse impact on the ability of RSA cellular licensees to expand their build-out in rural areas. Consolidation in the wireless industry is coming. Though the Commission would consider waivers of the cross-interest rule, the necessity of securing a waiver to consummate a transaction makes negotiating that transaction extraordinarily difficult, if not impossible. The uncertainty inherent in the waiver process makes potential partners and financial sources more hesitant to commit to a transaction, thus placing RSA-focused carriers like Dobson at a disadvantage. In addition, the cross-interest rule reduces the universe of potential investors from whom Dobson and other rural wireless carriers can obtain capital. Therefore, complete repeal of the cellular cross-interest rule in RSAs will promote the deployment of competitive wireless services in rural areas by assisting rural carriers in their efforts to attract the necessary capital to upgrade their networks and remain competitive.

In any event, the relevant inquiry is not whether retention of the rule will cause harm. Instead, the Commission should determine whether the rule remains necessary in light of the competitive environment in RSAs.<sup>33</sup> Viewed from this perspective, there is no justification for retaining the rule in RSAs. As the Commission found when repealing the rule for MSAs, case-by-case review under Section 310(d) of the Act, properly performed and with appropriate enforcement mechanisms, allows greater flexibility and greater attention to the actual circumstances of a particular transaction. There is no reason to believe that the Commission cannot protect the public interest by applying its competition policies to RSA transactions on a case-by-case basis.

Furthermore, the rule as applied is irrational. It prevents the two cellular carriers in a particular RSA from merging regardless of the particular competitive circumstances that exist in that RSA, but does

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<sup>33</sup> This is more in line with the Section 11 biennial review standard, which states that the Commission “shall determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.” 47 U.S.C. § 161(a)(2).

not prohibit a cellular carrier from merging with a 30 MHz PCS carrier in that same market, even if competitive conditions are less robust than in the former example. Whenever a transaction involves the loss of a competitor, the Commission reviews it under its competition policies. That process is sufficient to guard against competitive harm, without regard to the block of spectrum on which the parties to the transaction operate. Clearly, therefore, the cellular cross-interest rule is unnecessary.

At a minimum, the FCC should adopt its proposal to discontinue the cellular cross-interest restriction where there are more than three competitors in a particular RSA or non-controlling interests are involved. If it adopts the “three competitor” proposal, the Commission should define the term “competitor” broadly for purposes of any remaining cellular cross-interest rule. The term “competitor” should include all CMRS providers with a significant overlap (as defined in 47 C.F.R. § 20.6) with the cellular carrier, and should include not only facilities-based providers but also resellers.<sup>34</sup> In short, if a consumer can buy and use a wireless carrier’s phone in the market, then that carrier should be considered a competitor in that market. Because of roaming arrangements such as those Dobson has with AT&T Wireless, Cingular, and T-Mobile, facilities-based carriers in rural markets compete against nationwide carriers even if the nationwide carriers are not licensed to provide service there. Customers and potential customers in rural markets are aware of the rates and services offered by nationwide carriers, either because a nationwide carrier offers service (either themselves or through an affiliate, reseller, or roaming service provider) or because of national advertising. These rural consumers consequently expect to be offered those same services and rates. If a local rural carrier fails to meet these expectations, rural wireless customers usually can find a nationwide carrier who will provide service at nationwide carrier prices through the use of roaming arrangements.

In addition, a transition period before using case-by-case review as suggested in the notice is unnecessary.<sup>35</sup> The Commission did provide for a one year transition period when it eliminated the

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<sup>34</sup> The Commission considers resellers in analyzing the CMRS industry for its annual competition reports and should similarly consider resellers as competitors in this context. *See Competition Report* at ¶¶ 122-23.

<sup>35</sup> *NPRM* at ¶ 97.

spectrum cap to enable the agency “to consider appropriate processing and substantive guidelines, to reallocate or enhance Commission resources, and to give the market time to adjust and prepare for the change in an orderly way.”<sup>36</sup> Both the Commission and carriers have been subject to case-by-case review for almost a year now. Many transactions having been successfully processed under the informal staff guidelines. Also, elimination of the cross-interest rule is unlikely to substantially increase the number transactions processed by the Commission. A transition period will only cause undue delay.

### **III. The FCC Should Take A More Active Role In Facilitating “Best Practices” By Local Governments In Tower Siting.**

The Commission would do much to advance rural wireless build-out by taking active steps to facilitate the adoption of clear and consistently-applied siting standards by local governments. In constructing wireless networks throughout the country, Dobson has encountered a panoply of local zoning regulations that vary from town to town. In some instances, local zoning boards apply inconsistent, arbitrary, and unknowable standards in ruling on facilities siting requests. This patchwork of regulations delays build-outs and increases uncertainty and costs as local experts are often needed to sort through the intricacies of the local jurisdiction.

Chairman Powell recently stated, when announcing his environmental action plan on tower siting, that “[a]lthough the Commission’s statutory obligations are longstanding, I have recently concluded that the expanding need for telecommunications infrastructure requires the Commission to take a more proactive approach.”<sup>37</sup> The Commission should raise awareness on this issue by convening a forum, perhaps through its NEPA Action Team<sup>38</sup> or the Intergovernmental Advisory Committee (“IAC”),<sup>39</sup> to

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<sup>36</sup> 2000 Biennial Regulatory Review: *Spectrum Aggregation Limits for Commercial Mobile Radio Services*, WT Docket No. 01-14, *Report and Order*, 16 FCC Rcd 22668 ¶ 6 (2001).

<sup>37</sup> *FCC News Release*, “Environmental and Historic Preservation Action Plan, Statement by FCC Chairman Michael K. Powell” (rel. May 1, 2003).

<sup>38</sup> See *FCC News Release*, “FCC Establishes Inter-Agency Liaison Program for Environmental, Historic Preservation and Tribal Coordination Issues,” (rel. June 3, 2003).

<sup>39</sup> Formerly the Local and State Governmental Advisory Committee, the IAC “has provided ongoing advice and information to the Commission on a broad range of telecommunications issues of interest to state, local and tribal governments, including . . . facilities siting.” See *Modification of Subpart G, Section 0.701 of the Commission’s Rules, Order*, FCC 03-180 at 2 (rel. Aug. 11, 2003).



help to facilitate transparency and consistency in local zoning approvals. These discussions could then form the basis of a “best practices” guide to which municipalities could refer to ensure that their processes are fair, transparent, and consistent with the Communications Act.

#### **IV. The FCC Should Not Adopt Measures That Would Introduce Uncertainties In The Marketplace.**

To promote rural wireless services, the Commission’s primary goal should be to maintain a regulatory environment that fosters growth in the wireless industry. Many of the Commission’s proposals in the *NPRM*, however, are at odds with this goal and will instead create uncertainty in the capital markets. Moreover, as noted above, many of the proposals are premature given that the Commission’s secondary market initiative has not yet begun. In particular, Dobson opposes:

- the “keep what you use” approach to future spectrum licensing;
- the use of “government-defined easements” in licensed spectrum that would grant spectrum usage rights without the licensee’s prior consent;
- a vague “substantial service” requirement unless it operates only as a “safe harbor” at renewal;
- any post-license renewal construction requirements on licensees; and
- the use of audits to determine the amount of available spectrum.

With limited exception, these proposals are aimed at putting underutilized spectrum to use through some form of government reclamation. The licenses impacted are wide-area geographic licenses awarded through competitive bidding, not cellular licenses whose service areas coincide with actual service. The Commission is well aware that licensees and their investors have spent large sums of money to acquire this spectrum based on the valuations of this spectrum in a given geographic area. Proposals seeking to reclaim spectrum and tinker with construction requirements will interject uncertainty into the valuation of spectrum rights without doing much to promote rural wireless service.

The “Keep-What-You-Use” Approach Is Unwise. The CMRS industry began with the now archaic and burdensome site-by-site “keep what you use” approach applied to cellular licensing. If anything, the cellular licensing experience has shown that the “keep what you use” approach: (i) encourages litigation over spectrum rights because licensees fight to retain service area and expand coverage; (ii) requires large numbers of regulatory filings, which in turn increases the costs to licensees

and the Commission; and (iii) delays service to the public as licensees must wait for months to prepare applications and receive FCC-approval for system modifications. The Commission correctly adjusted its policies by moving to a market-based approach in licensing subsequent services such as PCS. Dobson opposes any attempt by the Commission to step backwards to the cellular licensing model. Moreover, use of the cellular model would undercut the secondary markets initiative.

Easements Should Not Be Allowed In Licensed Spectrum. Any consideration of government-defined easements in licensed spectrum is premature and unwarranted. The Commission has correctly shifted its policies to increasingly rely on marketplace forces to dictate the efficient allocation and use of spectrum. These forces work to their best effect, however, when licensees have a clear idea as to the rights that are associated with their licenses. The “exclusive use” licensing model encourages efficiency by providing the strongest incentives for parties to put the spectrum to its highest valued use.<sup>40</sup> Government-defined easements threaten this efficiency by impeding flexibility and potentially disrupting operations. Not only will easements motivate licensees to operate in an inefficient manner to preserve spectrum rights, but licensee operations may be disrupted by third-party easement operators. Most importantly, easements threaten valuation of spectrum acquired by licensees at auction by clouding the licensee’s spectrum rights. This in turn threatens the success of ongoing business plans and access to capital. As the Commission pointed out in the *NPRM*, the Spectrum Policy Task Force recommended that the Commission “focus on secondary markets as the primary means to increase access to spectrum” and consider government-defined easements “after there has been sufficient time to consider the effectiveness of [the secondary markets] approach.”<sup>41</sup>

A “Substantial Service” Safe Harbor Should Be Crafted So As To Be Meaningful. Dobson opposes the use of “vague” substantial service standards for satisfying applicable construction requirements. The uncertainties inherent in a judgment as to what qualifies as “substantial” service make population-based coverage requirements preferable. Dobson would, however, support the establishment

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<sup>40</sup> *Spectrum Policy Task Force Report* at 38.

<sup>41</sup> *NPRM* at ¶ 30.

of a “safe harbor” standard for substantial service in order to add certainty. This safe harbor could apply equally to satisfaction of construction requirements and to the award of a renewal expectancy in comparative renewal proceedings.<sup>42</sup>

In the *NPRM*, the Commission proposes a safe harbor for mobile wireless service licensees if coverage is provided, through construction or lease, to at least 75 percent of the geographic area of at least 20 percent of the rural counties in the license area.<sup>43</sup> This proposed safe harbor may need refinement. Rural counties are defined as those with a population density of 100 persons or less per square mile. As mentioned above, Dobson provides wireless service throughout Alaska and many other rural areas in the upper Midwest in Michigan, Minnesota, and Wisconsin in addition to areas in the southwest in Oklahoma and Texas. Many of the counties in these areas are markedly larger than those found in urban areas on the east coast. The safe harbor may thus prove meaningless in these regions where it is simply easier and more cost effective to meet the population requirements.

For example, the Commission recently awarded a PCS license to Dobson through Auction No. 35 in the Fairbanks, Alaska BTA.<sup>44</sup> The land area and population density (square miles – persons per square mile) for the boroughs included in the Fairbanks BTA are: Fairbanks North Star (7,366 – 11.2); Southeast Fairbanks (24,815 - .2); and the Yukon-Koyukuk (145,900 – 0.0).<sup>45</sup> For Dobson to qualify for the safe harbor, it would at a minimum need to build a network that provides coverage to 5,524.5 square miles in the Fairbanks North Star Borough. To make the safe harbor meaningful, the Commission should consider including in it a population component. For example, the safe harbor could be satisfied if coverage is provided, through construction or lease, to at least 75 percent of the population or 75 percent of the geographic area of at least 20 percent of the rural counties in the license area.

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<sup>42</sup> See 47 C.F.R. § 24.16.

<sup>43</sup> *NPRM* at ¶ 41.

<sup>44</sup> See *Public Notice*, “WTB Grants Three C and F Block Broadband PCS Licenses, Auction Event No. 35,” DA 03-2410 (rel. July 23, 2003) (awarding Station WPYD497 to DCC PCS, Inc., a wholly-owned subsidiary of Dobson).

<sup>45</sup> See U.S. Census Bureau, <http://quickfacts.census.gov/qfd/states/02/02240.html>.

No Post-Renewal Construction Requirements or Spectrum Audits. Dobson opposes the imposition of post-renewal construction requirements other than the “substantial service” threshold for obtaining a renewal expectancy that is already provided for in the rules. Market forces, and not build-out requirements, should govern any additional construction during renewal terms. Finally, there is no reason for the Commission to conduct spectrum audits. As the Commission concluded in the secondary markets proceeding, “if the market is dependent on this information [regarding spectrum availability] to flourish, economic incentives will encourage private sector entities to undertake the task.”<sup>46</sup> The Commission further noted, and Dobson concurs, that collecting such information may involve the disclosure of sensitive business information and impose additional costs on the Commission and licensees. The same rationale applies to the instant proceeding, and the Commission should thus similarly refrain from conducting spectrum audits in the present context.<sup>47</sup>

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<sup>46</sup> *Spectrum Leasing Order* at ¶ 193.

<sup>47</sup> The Commission is also evaluating this issue further in that proceeding and further consideration in the *NPRM* is duplicative and premature. *Spectrum Leasing Order* at ¶¶ 221-29.

## **CONCLUSION**

Dobson appreciates the opportunity to address issues of importance to rural wireless service. For the reasons set forth above, Dobson respectfully urges the Commission to recognize that it can best advance the statutory goal of development and rapid deployment of spectrum-based services in rural areas by ensuring that the regulatory environment in which these services are provided allows market forces to operate as freely as possible.

Respectfully submitted,

**DOBSON COMMUNICATIONS CORPORATION**

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